

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
DR. ROBERT NESLAND,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB No. 79-167

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

THIS MATTER, the appeal from a \$100 civil penalty for the alleged violation of RCW 43.21.130(3), 90.03.400 and 90.03.410 having come on regularly for formal hearing on the 4th day of February, 1980 in Yakima, Washington, and appellant, Dr. Robert Nesland, appearing through his attorney, Wade E. Gano and respondent, Department of Ecology, appearing through its attorney, Laura E. Eckert, Assistant Attorney General with Nancy E. Curington, hearing officer presiding, and the Board having considered the exhibits, records and files herein, and having reviewed the Proposed Order of the presiding officer mailed to the parties on the 28th day of February, 1980, and

1 more than twenty days having elapsed from said service; and
2 The Board having received no exceptions to said Proposed Order and
3 the Board being fully advised in the premises; NOW THEREFORE,
4 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that said Proposed
5 Order containing Findings of Fact, Conclusions of Law and Order dated
6 the 28th day of February, 1980, and incorporated by reference herein
7 and attached hereto as Exhibit A, are adopted and hereby entered as
8 the Board's Final Findings of Fact, Conclusions of Law and Order
9 herein.

10 DATED this 28th day of March, 1980.

11 POLLUTION CONTROL HEARINGS BOARD

12
13 Nat W Washington
14 NAT W. WASHINGTON, Chairman

15 Chris Smith
16 CHRIS SMITH, Member

17 David Akana
18 DAVID AKANA, Member

CERTIFICATION OF MAILING

I, Trish Ryan, certify that I mailed, postage prepaid, copies of the foregoing document on the 20th day of March, 1980, to each of the following-named parties at the last known post office addresses, with the proper postage affixed to the respective envelopes:

Wade E. Gano
Attorney at Law
P.O. Box 1410
Yakima, WA 98907

Laura E. Eckert
Assistant Attorney General
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Olympia, WA 98504

Lloyd Taylor
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St. Martin's College
Olympia, WA 98504

Dr. Robert Nesland
Route 1, Box 1228
Selah, WA 98942



TRISH RYAN
POLLUTION CONTROL HEARINGS BOARD

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF)	
DR. ROBERT NESLAND,)	PCHB No. 79-167
)	
Appellant,)	PROPOSED FINDINGS OF FACT
)	CONCLUSIONS OF LAW
v.)	AND ORDER
)	
STATE OF WASHINGTON,)	
DEPARTMENT OF ECOLOGY,)	
)	
Respondent.)	

This matter, the appeal of a \$100 penalty for the alleged violation of RCW 43.21.130(3), 90.03.400 and 90.03.410, came before the Pollution Control Hearings Board in Yakima on February 4, 1980. Nancy E. Curington, Administrator, presided.

Appellant was represented by his attorney, Wade E. Gano. Respondent was represented by Laura E. Eckert, Assistant Attorney General.

Having heard the testimony, having examined the exhibits and having considered the contentions of the parties, the Pollution

Exhibit A

1 Control Hearings Board makes these

2 FINDINGS OF FACT

3 I

4 Appellant owns farming property located in the Wenas Valley, near
5 Selah, Washington. Wenas Creek flows through the narrow valley; a
6 manmade lake, Wenas Lake, is located at the head of the creek.
7 Appellant has adjudicated rights to withdraw from the creek at the
8 Miller Ditch for irrigation of his farm property. The Miller Ditch
9 has a concrete structure across the streambed, with a sliding steel
10 headgate for regulation.

11 II

12 On July 3, 1979, respondent's employee began regulating the flow
13 of Wenas Creek, and he posted a heavy paper notice of the regulation
14 on a board next to the headgate at the Miller Ditch. On July 11,
15 1979, the employee returned to the Miller Ditch and found that the
16 headgate had been opened; he then readjusted the headgate so that
17 approximately 84 cubic feet per second of water was flowing through
18 the weir and downstream.

19 III

20 On July 13, 1979 respondent's District Supervisor at Union Gap
21 received a telephone call from the appellant, indicating that his
22 supply had been readjusted, and that he had placed a padlock on the
23 Miller Ditch headgate. Later a downstream user with rights equal to
24 the appellant called and told the supervisor that her water had been
25 shut off since the previous night. The supervisor and another
26 employee visited the site; they found that not enough water was

1 flowing downstream to satisfy downstream users. However, because the
2 headgate was padlocked, they could not readjust the headgate. The
3 notice of regulation was on the site at that time.

4 Later that afternoon, appellant's attorney called the supervisor
5 to inform him that the padlock had been removed. When respondent's
6 employee returned to Miller Ditch on July 16, 1979, the notice was
7 still on the headgate and the padlock was gone. The headgate was
8 re-adjusted at that time.

9 IV

10 On August 15, 1979, respondent served appellant with a "Notice of
11 Penalty Incurred and Due", for \$100, because the Miller Ditch headgate
12 had been readjusted and a lock had been installed on the headgate.
13 Appellant submitted an application for relief from the penalty on
14 August 31, 1979; on September 19, 1979 respondent affirmed the penalty
15 assessment. The Notice of Penalty is the subject matter of the appeal.

16 V

17 Appellant has had some experience with vandalism at the Miller
18 Ditch. When his supply of water was greatly diminished on July 13,
19 1979, he saw that the headgate was nearly closed. He did not see any
20 indication that the stream was being regulated by the respondent. He
21 believed that the headgate had been tampered with by vandals, so he
22 readjusted it to the previous level and padlocked it to insure that it
23 would remain in that position. He then called respondent to inform
24 them of his actions; he removed the lock three hours later.

25 VI

26 RCW 90.03.400 provides that unauthorized use of water is a

1 misdemeanor.¹ RCW 90.03.410 provides that wilful interference
2 with a headgate for diversion of water is a misdemeanor.²

3
4 1. RCW 90.03.400 CRIMES AGAINST WATER CODE

5 --UNAUTHORIZED USE OF WATER. The unauthorized
6 use of water to which another person is entitled
7 or the wilful or negligent waste of water to the
8 detriment of another, shall be a misdemeanor.
9 The possession or use of water without legal
right shall be prima facie evidence of the guilt
of the person using it. It shall also be a
misdemeanor to use, store or divert any water
until after the issuance of permit to appropriate
such water.

10 2. RCW 90.03.410 CRIMES AGAINST WATER CODE

11 --INTERFERENCE WITH WORKS--WRONGFUL USE OF
12 WATER--PROPERTY DESTRUCTION--PENALTY. (1)
13 Any person or persons who shall wilfully interfere
14 with, or injure or destroy any dam, dike,
15 headgate, weir, canal or reservoir, flume or
16 other structure or appliance for the diversion,
17 carriage, storage, apportionment or measurement
18 of water for irrigation, reclamation, power or other
19 beneficial uses, or who shall wilfully use or
20 conduct water into or through his ditch, which has
been lawfully denied him by the water master or other
competent authority, or shall wilfully injure or
destroy any telegraph, telephone or electric transmission
line, or any other property owned, occupied or controlled
by any person, association, or corporation, or by the
United States and used in connection with said beneficial
use of water, shall be guilty of a misdemeanor or, if
there is actual physical injury to or destruction of
any real or personal property, of property destruction
and shall incur the penalties set forth in RCW 9.61.070.

21 (2) Any person or persons who shall wilfully or
22 unlawfully take or use water, or conduct the same
23 into his ditch or to his land, or land occupied by
24 him, and for such purpose shall cut, dig, break down
25 or open any headgate, bank, embankment, canal or
reservoir, flume or conduit, or interfere with,
injure or destroy any weir, measuring box or other
appliance for the apportionment and measurement of
water, or unlawfully take or cause to run or pour
out of such structure or appliance any water, shall be

VII

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings the Board comes to these

CONCLUSIONS OF LAW

I

Appellant violated the provisions of RCW 90.03.400 and 90.03.410 by adjusting the Miller Ditch headgate so that he could increase the flow of water to his property.

II

It appears that appellant believed he was rectifying the damage done by vandals by readjusting the headgate, and insuring the maintenance of the adjustment by padlocking the gate. Although appellant was clearly not authorized in his actions, it does not appear that he took those actions in bad faith. Consequently, the \$100 penalty should be suspended on the condition that he not violate RCW 90.03.400 and 90.03.410 for a period of two years.

III

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

2. CONT.

guilty of a misdemeanor or, if there is actual physical injury to or destruction of any real or personal property, of property destruction and shall incur the penalties set forth in RCW 9.61.070.

(3) The use of water through such structure or structures, appliance or appliances hereinbefore named after its or their having been interfered with, injured or destroyed, shall be prima facie evidence of the built of the person using it.

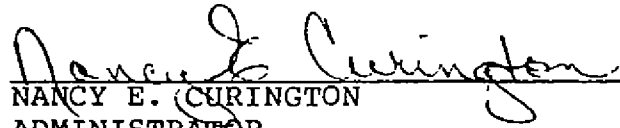
1 From these Conclusions the Board enters this

2 ORDER

3 The \$100 penalty is affirmed, provided, however, that it is
4 suspended on the condition that appellant not violate RCW 90.03.400
5 and 90.03.410 for a period of two years after this Order becomes final.

6 DATED this 28th day of February, 1980.

7 POLLUTION CONTROL HEARINGS BOARD

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9 
10 NANCY E. CURINGTON
11 ADMINISTRATOR
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